United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1406

To be argued by
THOMAS E. ENGEL

B
P/S

United States Court of Appeals

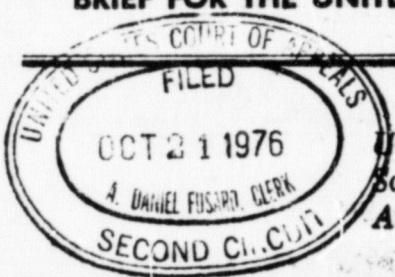
FOR THE SECOND CIRCUIT

Docket No. 76-1406

In the Matter of the Grand Jury Subpoena Served on JOHN DOE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS E. ENGEL,
RHEA KEMBLE NEUGARTEN,
JERRY L. SIEGEL,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

Cases:

OTHER AUTHORITIES

Statutes:

Rules:

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1406

In the Matter of the Grand Jury Subpoena Served on JOHN DOE.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Richard Roe, John Doe, and X Corporation * appeal from an order entered on September 9, 1976 in the United States District Court for the Southern District of New York, by the Honorable Charles S. Haight, Jr., denying their motion, by way of order to show cause, for an injunction of a grand jury investigation of various possible violations of federal law, including the income tax laws, 26 U.S.C. §§ 7201 *et seq.*, and obstruction of justice, 18 U.S.C. § 1503.

Statement of Facts

A. Introduction

On August 25, 1976, John Doe, who was later revealed to be an attorney working as a private investigator for Gerald Walpin, Esq., attorney for Richard Roe and X

* By order dated September 22, 1976, this Court directed that pseudonyms be used in referring to the various parties.

Corporation, was served with a subpoena to appear before a grand jury sitting in the United States District Court in the Southern District of New York (Tr. 9; Affidavit of Thomas E. Engel sworn to September 3, 1976 ("Engel Aff.") ¶ 12)).* At the time the subpoena issued requiring Doe's appearance, the United States Attorney's Office did not know Doe's identity, much less that of his employer, Mr. Walpin (Tr. 9; Engel Aff. ¶ 13). On August 31, 1976, after learning Doe's true identity, Thomas E. Engel, the Assistant United States Attorney in charge of the grand jury investigation, concluded that the subpoena should be withdrawn (Tr. 6; Engel Aff. ¶ 17; Memorandum and Order of the Honorable Charles S. Haight, Jr. dated September 9, 1976 ("Memorandum")).

On August 27, 1976, during the interim period between the issuance and the withdrawal of the Doe subpoena, this litigation was commenced by Doe, Roe, and X Corporation,** by order to show cause seeking the following:

> "(a) Quashing the grand jury subpoena served on John Doe on August 25, 1976;
>
> (b) Enjoining the United States Attorney and the Grand Jury from proceeding with the investigation of X Corporation and/or Richard Roe.

---

* "Tr." refers to the transcript of proceedings held before the Honorable Charles S. Haight, Jr. on September 8, 1976. "P" refers to the transcript of the preliminary hearing on an order to show cause before the Honorable Henry F. Werker on August 27, 1976. "A" refers to the transcript of proceedings on an application by Doe, Roe and X Corporation to amend Judge Haight's opinion of September 9, 1976 and for other relief. "Br." refers to appellants' brief on appeal.

** In the interim Doe had retained Mr. Walpin to represent him in connection with these proceedings. (Affidavit of Gerald Walpin sworn to August 27, 1976 ("Walpin 8/27/76 Aff.") at 1).

(c) Enjoining the United States Attorney, the Grand Jury, or any of his or its agents, from further interference with the investigation by and on behalf of counsel for X Corporation and/or Richard Roe.

(d) Suppressing testimony and/or evidence relevant to the matters being investigated by John Doe and

(e) Such other and further relief as to this Court seems just."

By memorandum and order dated September 9, 1976, the district court denied the appellant's motion.

B. The Underlying Grand Jury Investigation

Prior to the commencement of this action, a grand jury sitting in the Southern District of New York was investigating possible criminal violations of the Internal Revenue Code by X Corporation, Roe, and another man named Philip Poe (Engel Aff. ¶ 3; Affidavit of Gerald Walpin sworn to September 7, 1976 ¶ 3,). On July 30, 1976, Mr. Engel informed Mr. Walpin that his clients, X Corporation and Richard Roe, were targets of that investigation. (Engel Aff. ¶ 3).

C. The Issuance of the Subpoena

On August 24, 1976 the United States Attorney's Office was informed that sometime prior to that date, John Doe sought to interview various persons in Yonkers, New York, about the activities of Philip Poe, (Engel Aff. ¶¶ 6, 7, 16),* who was a former employee of

* Doe, Roe, and X Corporation appear to dispute the accuracy of the information which the Government received. (Br. at 7). Whether the representations were true or untrue is of no moment in considering the good faith of the Government in issuing the subpoena. There is no dispute—nor has there ever been—as to what the Government was told before issuing the subpoena.

X Corporation and who worked closely with Roe while there. It appears that Roe suspected, and continues to suspect, that Poe is cooperating with the federal government (P. 5; Br. at 19). Doe interviewed the persons to whom the Poes rent their home and told them falsely that Poe did not own the house. He also sought permission from the Poes' tenants to search the house for personal records which Poe kept at the house.

Further, Doe also inquired of Poe's neighbors about the two Poe children, to wit, where they lived, where they went to school, and how old they were. Doe also interviewed the mailman who delivered mail to the Poe's household at which time he falsely claimed to be a court officer of the City of Yonkers and wanted to know where the Poe family had moved. (*Id.*) *

The Poes later heard of these inquiries and immediately called their lawyer and reported their apprehension. On August 24, 1975 their lawyer, in turn relayed this information to the United States Attorney's Office (Engel Aff. ¶ 5).**

On the same day, a subpoena was drawn for Mr. Doe's appearance before the grand jury on August 31, 1976, the day on which Mr. Engel was due to return from vacation (Tr. 2-3, 6; Engel Aff. ¶ 11). The subpoena was served the following day, August 25, 1976 (Engel Aff. ¶ 12).

---

* Doe's masquerade became apparent only after Walpin identified him as his investigator who was following his instructions in every respect (Walpin 8/27/76 Aff. at 6)

** Poe's lawyer, Mr. S, first spoke with Assistant United States Attorney Thomas M. Fortuin. Mr. Fortuin, in turn, called Mr. Engel who was on vacation. Thereafter, Mr. Engel spoke directly with Poe's lawyer who reported his and his clients' fears with respect to Doe's inquiries (Engel Aff. ¶¶ 6, 7). Mr. S reported, *inter alia*, that Roe, who was once very close to Poe, had a prior criminal record and organized crime connection. (Engel ¶¶ 8, 9).

D. The Reaction to the Subpoena

After being served with the subpoena, Doe called Assistant United States Attorney Fortuin and identified himself as a lawyer and former F.B.I. agent. Fortuin told Doe the investigation concerned obstruction of justice and that he was a target.* Doe was also told that he had a right to a lawyer, and that while there was an underlying investigation, the grand jury was not investigating surreptitious entries by F.B.I. agents (Engel Aff. ¶ 12).

On the following day, August 26, 1976, Walpin informed the Chief of the Criminal Division of the United States Attorney's Office, Elkan Abramowitz, that Doe had been retained by him in connection with the underlying investigation of X Corporation and Richard Roe.** Abramowitz spoke to Fortuin and informed Walpin that the subpoena would stand (Memorandum at 3; Engel Aff. ¶ 13).

---

* Through a clerical error, the specific violations being investigated by the grand jury were omitted from the subpoena (Walpin 8/27/76 Aff. at 3).

** Roe and X misleadingly suggest that the Government knew Doe's true status prior to the issuance of the subpoena because Mr. Engel at the hearing on September 8th said the Government "probably" knew Doe's status for the first time on the morning of August 26th. (Br. at 21-23). As the transcript of the September 8th conference reveals, Mr. Engel's use of the word "probably" referred only to whether the information was received that morning, or the night before when Doe called Fortuin directly after receiving the subpoena. (Tr. 8-9). In no way does it suggest that the information was received before the subpoena was served. The Government's declaration that Doe's identity was not known until the 26th obviously took Judge Haight by surprise, since, as Judge Haight indicated, Mr. Walpin's original affidavit in support of the order to show cause had led him to draw "the inference that the Government knew that [Doe] was an attorney-investigator at the time the subpoena was issued and served upon him." (Tr. 18).

Fortuin then told Walpin that the subpoena could be adjourned until later in the week of August 31, 1976 so that Mr. Walpin and Mr. Engel could discuss the matter upon the latter's return from vacation (Engel Aff. ¶ 14).

E. The Proceedings in the District Court

On August 27, 1976, the order to show cause was filed by Doe, Roe, and X Corporation seeking injunctive relief as well as the quashing of the subpoena directed to Doe. Judge Werker listened to brief discussion and then adjourned the "hearing" on the order to show cause for ten days.* (¶ 11-12).

On August 31, 1976 Assistant United States Attorney Engel returned to the Office and thereafter determined that the subpoena should be withdrawn (Memorandum at 3; Engel Aff. ¶ 17).** In withdrawing the subpoena,

---

* The transcript reflects that Judge Werker merely directed that the matter be set down "for hearing", (P. 10) and, by explaining that the litigants should be "prepared" for an evidentiary hearing, left open whether the hearing would be devoted to arguments or evidence (P. 12).

It was during this court appearance that Assistant United States Attorney Fortuin inquired of Walpin whether he knew Poe was represented by counsel (P. 8). After reading Mr. Walpin's affidavit, Mr. Fortuin inquired of Walpin if his purpose in sending Doe to Poe's house was to have Doe try to talk to Poe. (P. 5, 8). Assistant United States Attorney Fortuin's concern was whether in addition to obstruction of justice there had also been a violation of the Canons of Ethics by Mr. Walpin and Doe—both of whom were attorneys. As Roe and X Corporation now admit (Br. at 3-4), Poe was then a claimant in a civil action against X Corporation. Secondly, Roe and X Corporation obviously regard Poe as adverse in the criminal matter (Br. at 3-4). In view of the fact that counsel for Roe and X Corporation was advised that Poe was represented by counsel (P. 5, 8), the inquiry certainly was proper.

** The subpoena was not withdrawn, as suggested by appellants (Br. at 12), explicitly because Doe would be protected by

[Footnote continued on following page]

however, the Government stated that the investigation into the possible obstruction of justice would continue and that the Government would seek an indictment against Doe if the facts, as developed before the grand jury, warranted it. (*Id.*).

F. The Hearing Before Judge Haight

On September 8th a hearing was held before Judge Haight who had previously been furnished with affidavits and legal memoranda on behalf of both sides. Judge Haight issued his opinion the following day finding that the Government had a "colorable basis" for investigating Doe and that the Government did not know until August 26th that Doe was employed by Walpin as counsel to Roe and X Corporation. (Memorandum 3, 11). Judge Haight concluded that the "injunctive and suppressive relief sought by sub-paragraphs (b), (c), and (d) of the order to show cause fall beyond the proper exercise of . . . [the] Court's powers." (*Id.* at 5).

On the following day Walpin sought to amend Judge Haight's opinion and to procure a representation from the Government that it did not presently intend to pursue the grand jury investigation of Doe. The court amended its opinion as requested. The Government refused to opine on the merits of, or represent what would happen to, the Doe investigation, stating that it would be improper to do so (A. 9). The Government further stated it would notify Mr. Walpin either of an indictment of Doe or of the termination of the investigation (A. 10). The court declined to require the Government to give any "information or status reports on the progress of the status of the grand jury investigation" other than what the Governmen had volunteered. (A. 12).

---

the work-product privilege (Engel Aff. ¶ 17). The Government does not concede that Doe's position is one protected by the privilege enunciated in *In re Terkeltoub*, 256 F. Supp. 683 (S.D.N.Y. 1966) or that that privilege applies at all in these circumstances.

ARGUMENT

POINT I

This appeal should be dismissed because the order of the District Court is not appealable under 28 U.S.C. §§ 1291 or 1292.

Doe, Roe, and X Corporation seek to appeal from an order denying them relief sought upon an order to show cause, specifically the denial of an injunction against the United States Attorney and the grand jury from (a) investigating Doe, Roe and X Corporation and (b) interfering with an investigation being undertaken on behalf of Roe and X Corporation in connection with both the grand jury proceedings and a civil litigation matter.* The order denying that relief is neither a "final decision" within the meaning 28 U.S.C. § 1291 nor an appealable interlocutory decree within the meaning of 28 U.S.C. § 1292(a)(1). Accordingly, this appeal should be dismissed.

As this Court has recently remarked, "dismissal of an appeal from a pretrial order of a federal district court simply means that the trial will occur and, unless the appellant wins, the court of appeals will then hear a multi-faceted appeal from him in any event." *United States* v. *Alessi*, Dkt. No. 76-1189 (2d Cir. July 7,

* By the same order to show cause, the movants in the District Court sought to quash a grand jury subpoena issued to Doe and to suppress testimony and evidence relevant to the matters being investigated by Doe. The subpoena was withdrawn by the Government thus mooting the request to quash. The suppressive relief was never seriously pressed, perhaps because there was nothing to suppress in view of Doe's refusal to testify and the subsequent withdrawal of the subpoena.

1976) Slip op. 4781, 4801. The instant case, involving a *pre-indictment* order, presents even stronger reasons for dismissing the present appeal. Roe and X Corporation's professed concern is that the grand jury's and the Government's acts may deprive them of effective assistance of counsel in that they may lose Doe's services and Doe may prove difficult to replace.* Should this situation—which is speculative at best—come to pass, dismissal of this appeal will not in any event have damaged Roe and X Corporation if no indictment is returned in the tax investigation. If they are indicted, on the other hand, they may seek relief by a pre-trial motion. Should their pre-trial motions be denied, they can assert these issues in a "multi-faceted" and comprehensive appeal if they are convicted.

Since the Supreme Court's decision in *Cobbledick* v. *United States*, 309 U.S. 323 (1940), it has been settled that "It is no less important to safeguard against undue interruption of the inquiry instituted by a grand jury than to protect from delay the progress of the trial after

---

* Their claim that they will lose Doe's services was never supported by an affidavit of Doe in the district court. Their claim that other clients of Doe would be hesitant to retain him when the existence of the grand jury investigation became known assumes that the investigation will become public. (Br. at 15-16). As the government attorneys, grand jury reporters and grand jurors are bound by the secrecy of the proceedings under Rule 6(e), Federal Rules of Criminal Procedure, and as Doe and his attorney are not so bound, one must assume that they will not seek to advertise to his other clients the existence of this investigation. The effect that the existence of the investigation will have on Doe himself is something which is cognizable only by Doe and his conscience, a forum that may not be competently reviewed here. Lastly, Doe suggests that the Government's attempts to subpoena or interview persons to whom Doe has already spoken will make them reticent to give information to Doe, "a person being investigated for obstruction of justice." (Br. at 16). This suggestion again assumes misconduct in violation of 6(e) by the Government.

an indictment has been found." 309 U.S. at 327. See *Kerr* v. *United States District Court*, 44 U.S.L.W. 4839, 4841 (June 14, 1976). Recognizing that the duration of the grand jury's life, frequently short, is limited by statute, and that "encouragement of delay is fatal to the vindication of the criminal law," 309 U.S. at 325, the courts have vigorously enforced the "strong congressional policy against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals," *United States* v. *Nixon*, 418 U.S. 683, 690 (1974), prior to as well as after the issuance of an indictment by a grand jury. *Cobbledick* v. *United States*, 309 U.S. at 327; *Di Bella* v. *United States*, 369 U.S. 121 (1962); *Alexander* v. *United States*, 201 U.S. 117 (1906).

These interests are even stronger where one seeks not merely to quash a subpoena directing that he appear before a grand jury as in *Cobbledick*, but rather seeks to bring to a halt an active and ongoing grand jury investigation.* In light of the importance of the grand jury in the enforcement of the criminal law, the courts have jealously guarded the independence of that body, see *United States* v. *Calandra*, 414 U.S. 338, 343 (1974); *Blair* v. *United States*, 250 U.S. 273, 282 (1919); *Hale* v. *Henkel*, 201 U.S. 43 (1906); *In re Subpoena of Persico*, 522 F.2d 41 (2d Cir. 1975); and have repeatedly rebuffed attempts to impede its freedom "to pursue its

---

* While it is by no means clear that Roe and X Corporation even have standing to join in Doe's motion to quash a subpoena directed to him, it is apparent that Doe lacks any possible basis upon which to join in the motion of Roe and X Corporation to enjoin the grand jury investigation in which they are involved. See *In re Grand Jury Investigation of Violations of 18 U.S.C. § 1621 (Perjury)*, 32 F.R.D. 175 (S.D.N.Y.), *appeal dismissed*, 318 F.2d 533 (2d Cir. 1963), *cert. dismissed*, 375 U.S. 802 (1964); *In re Grand Jury Subpoena Duces Tecum*, 76 Cr. Misc. 1 (S.D.N.Y. Oct. 1, 1976) (oral opinion of the Honorable Edmund L. Palmieri at which counsel for appellants was present).

investigations unhindered by external influence or supervision," *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973), or otherwise "to delay and disrupt grand jury proceedings," *United States* v. *Calandra*, *supra*, 414 U.S. at 349. Accordingly, one who unsuccessfully seeks to enjoin a grand jury proceeding, may not appeal directly from the denial of that motion but must instead await the filing of an indictment and trial to renew his claims, prior to appealing an adverse decision should a conviction result. See *In re Grand Jury Investigation of Violations of 18 U.S.C. § 1621 (Perjury)*, 318 F.2d 533, 535-36 (2d Cir. 1963), *cert. dismissed*, 375 U.S. 802 (1963) (hereinafter *"General Motors"*).* *United States* v. *Alessi*, *supra*.

---

* While the courts have carved a narrow exception to the broad proscription against appealability in such cases where "denial of immediate review would render impossible any review whatsoever of an individual's claims," *United States* v. *Ryan*, 402 U.S. 530, 533, (1971); see *Perlman* v. *United States*, 247 U.S. 7 (1918), this is clearly not such a case. In *General Motors*, *supra*, a federal grand jury investigating possible perjury violations committed before another federal grand jury that had returned an anti-trust indictment against General Motors, summoned before it possible witnesses for the defense in the anti-trust trial. This Court, through Judge Friendly, held the denial of a motion to limit the grand jury's perjury investigation to be non-appealable in view of the ability of General Motors to obtain the relief requested by pre-trial motion, and accordingly, dismissed the appeal.

The efforts of Roe and X Corporation to cast their claims in terms of an infringement of their Sixth Amendment right to counsel, even if such a position had merit, which it does not, see *infra* at 15, would stand them in no better stead. As the Court noted in *Cobbledick*,

> "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." *Cobbledick* v. *United States*, 309 U.S. 323, 326-27 (1940)

Accordingly, it is clear that an order by a district court denying either a motion to quash a subpoena or to enjoin an ongoing grand jury investigation is not appealable as a final decision under 28 U.S.C. § 1291. Similarly, there is no question but that such an order is not an appealable interlocutory order within the meaning of 28 U.S.C. § 1292(a)(1) in view of the Supreme Court's statement in *DiBella* and this Court's recognition in *General Motors*, *supra*, 318 F.2d at 536, that "Every statutory exception [to the rule of finality] is addressed either in terms or by necessary operation solely to civil actions." 369 U.S. at 1260. Since the grand jury investigation is by its terms a criminal matter, it follows explicitly from *General Motors* that no basis for appellate jurisdiction exists.

POINT II

The District Court properly refused to enjoin the grand jury investigation without an evidentiary hearing.

Contrary to appellants' oft-repeated assertion that the district court denied them the relief they sought because it found it lacked the power to do so, the court in fact found that appellants were not entitled to the very extraordinary relief requested. An accurate reading of the record in this case reveals the court's conclusion to have been a proper one in all respects.

Quite apart from the complete absence of any plausible claim of prosecutorial misconduct in the issuance of the Doe subpoena or in the continuation of that investigation, one must note at the outset the very extraordinary nature of the relief sought in this case. The Supreme Court in *Blair* v. *United States*, 250 U.S. 273, 282 (1919) discussed the historic function of the grand jury in the following terms:

> "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labor, not at the beginning."

More recently in *United States* v. *Calandra*, 414 U.S. 338, 343-4 (1974), the Supreme Court commented upon the wide latitude traditionally accorded the grand jury to inquire into violations of criminal law:

> "No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. . . . The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged."

Mindful of the fundamental role played by the grand jury in the enforcement of the criminal law, courts have been vigilant in their efforts to ensure that delay and procedural impediments not be employed to frustrate the functioning of the grand jury. Appellants' contention that the district court be required to hold an evidentiary hearing on the question of prosecutorial misconduct before permitting an ongoing grand jury investigation to continue, poses precisely the threat to

the functioning of the grand jury against which the Supreme Court warned in *United States* v. *Calandra*, *supra*, 414 U.S. at 349-50. There the Court held that a grand jury witness could not invoke the exclusionary rule in the grand jury in order to prevent the introduction of allegedly illegally seized evidence.

> "The probable result would be 'protracted interruption of grand jury proceedings,' *Gelbard* v. *United States*, 408 U.S. 41, 70 (1972) (White, *J.*, concurring), effectively transforming them into preliminary trials on the merits. In some cases the delay might be fatal to the enforcement of the criminal law. Just last Term we reaffirmed our disinclination to allow litigious interference with grand jury proceedings:
>
> 'Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws.' *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973)."

Indeed, this very appeal underlines the legitimacy of the Court's concern in *Calandra* that adjudication of such issues prior to trial "would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective." 414 U.S. at 349.

It is thus not surprising that despite the invitation by the District Court in its order, appellants have still failed to cite any case in which a district court has enjoined the continuation of a grand jury investigation on the basis of alleged prosecutorial misconduct.*

---

* As the District Court found:

> The movants cite a number of cases describing the Court's supervisory powers in general terms; condemning

[Footnote continued on following page]

Mindful of the very extraordinary nature of the relief sought, the District Court declined to grant the relief requested because it found that the affidavit submitted by Assistant United States Attorney Engel setting forth the basis upon which the subpoena was issued "describes certain activities on the part of Doe which are in my opinion sufficient to justify the initiation of a grand jury investigation into possible obstruction of justice." (Memorandum at 11). The fact that there was a colorable basis upon which the Government could and did initiate a grand jury investigation concerning Doe was deemed sufficient by the district court to deny the injunctive relief sought by Roe and X Corporation.*

---

prosecutorial misconduct in equally general terms; and declaring the vital importance of fair play and a fair trial. Certainly this Court has no quarrel with any of these principles. But the cases cited by the movants, when analyzed, furnish no authority upon which I may enjoin a pending grand jury inquiry, at the behest of two of its "targets". Each of the movants' cases concerns an allegation of prosecutorial misconduct which is made the basis of a motion for new trial, or appeal after conviction, *after trial on the merits has been concluded.*" (Memorandum at 6).

* Assuming a proper basis upon which to commence the investigation, Doe certainly has no right not to have his conduct investigated by the grand jury. Nor do Roe and X Corporation have any Sixth Amendment right not to have their private investigator investigated. Their only conceivable right is not to have the private investigator be compelled at this time to appear before a grand jury investigating them.

The Government does not concede on this appeal however either that *In re Terkeltoub*, 256 F. Supp. 683 (S.D.N.Y. 1966) was correctly decided, or that it applies to an investigator's—as distinguished from counsel's—conversations with third parties.

In none of the cases cited by appellants to Judge Haight in support of their motion to quash the subpoena was there any suggestion that the underlying grand jury investigation itself should be enjoined. Rather, in each case, the extent of the relief was simply the quashing of the subpoena. *See In re Grand Jury Pro-*

[Footnote continued on following page]

Indeed no serious question of the propriety of commencing such an investigation can be raised. Poe, as a former employee of X Corporation and a close associate of Roe while so employed, was suspected by Roe and his attorney of cooperating with the federal government. In light of this fact, the conduct of Doe raised a colorable, even vivid, basis upon which to undertake and continue an investigation of a possible violation of 18 U.S.C. § 1503 on the part of Doe. Specifically, Doe (a) falsely told the tenants of Poe's house that Poe did not own the house, (b) falsely held himself out to the Poe's mailman as a court officer of the City of Yonkers, and (c) inquired of the Poes' neighbors, *inter alia*, the whereabouts of the Poe children. The issue, it must be noted, is not what the true intentions of Doe were in making these inquiries, which Judge Haight for purposes of this motion, assumed to be benign, but whether based upon the information given to the Government concerning Doe's conduct, it was reasonable to undertake such an investigation.

---

ceedings (Duffy), 473 F.2d 840 (8th Cir., 1973) (reversing contempt citation against attorney who had refused to testify concerning certain matters, in part because in a continued investigation, information could be sought from other sources); *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943 (E.D. Pa., 1976) (on motion to enforce subpoena served on an attorney, the court recognized, as did *United States* v. *Nobles*, 422 U.S. 225 (1975), a qualified rather than absolute work-product privilege); *In re Grand Jury Subpoena (Rosenbaum)*, 401 F. Supp. 807 (S.D.N.Y. 1975) (subpoena of attorney in connection with an investigation of possible perjury at trial); *In re Stolar*, 397 F. Supp. 520 (S.D.N.Y., 1975) (subpoena issued to attorney to force him to disclose whereabouts of a client sought for questioning in connection with crime allegedly committed by another person, quashed in part because information was obtainable through other means; *In re Terkeltoub*, 256 F. Supp. 683 (S.D.N.Y. (1966) (enforcement of subpoena addressed to attorney in connection with investgation of alleged pre-trial effort to suborn perjury).

Appellants complain that the Government commenced the Doe investigation by serving a grand jury subpoena upon him based "solely upon the third-hand say-so of Poe's counsel, without making independent inquiries." (Br. at 20). It is clear, however, that:

> "an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors, *Costello* v. *United States*, 350 U.S. at 362. It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made. . ." *Branzburg* v. *Hayes*, 408 U.S. 665, 701-702 (1972), quoted in *United States* v. *Calandra*, *supra*, 414 U.S. at 344.

Appellants, on the other hand, seek to have an Assistant United States Attorney conduct an independent examination, indeed almost a mini-trial, prior to commencing a grand jury investigation. Such a requirement not only would seriously diminish the role of the grand jury in the investigation of possible violations of the criminal law, but it also would seriously hinder its ability to carry out its function by greatly restricting the flow of information which the grand jury is entitled to consider.

Finally, appellants attack the District Court's failure to conduct an evidentiary hearing into these matters. Were every claim of prosecutorial misconduct in a grand jury investigation deemed to require that a district court conduct an evidentiary hearing into the matter before allowing the grand jury to proceed, potential targets of such investigations would thereby be armed with a readily-available means of frustrating the process of the grand jury, and as the Supreme Court warned in

Cobbledick, the criminal law itself.* Accordingly, courts have disposed of such matters on the basis of affidavits alone, as did Judge Edelstein in *General Motors*, *supra*, 32 F.R.D. at 179, and Judge Werker in *Ostrer* v. *Aronwald*, 76 Cir. 3701 (S.D.N.Y. Aug. 31, 1976) (opinion relied on by Judge Haight below (Memorandum at 7-8)). Cf. *Universal Manufacturing Co.* v. *United States*, 508 F.2d 684, 686, n. 2 (8th Cir. 1975); *In re Morgan*, 377 F. Supp. 281 (S.D.N.Y. 1974) (*Gurfein*, J.).**

---

* The evidentiary hearing sought by movants in the district court envisioned calling Assistant United States Attorneys Engel and Fortuin; Mr. S., the attorney for Poe; Mrs. Poe, who initially spoke to Mr. S. about Doe, and all the persons Doe spoke to about Poe. (Tr. 24-26). The Government would thus almost certainly be required to disclose matters that would otherwise be privileged, such as, in this case, the existence, if any, and the identity, of informants. As a practical matter, the Government cannot respond to claims like Roe's and X Corporation's without at least seeming to confirm the identity of Poe or others as informants. The result raises concerns for the safety of witnesses and the distinct possibility of intimidation and improper influence on the basis of merely fanciful and unfounded allegations. Moreover, the limelight being cast upon one witness would undoubtedly deter others from coming forward and cooperating with the Government and the grand jury, thus frustrating the historic role of the grand jury and the effective administration of the criminal law. Finally, the prospect of calling prosecutors to the stand to testify about their conversations and memoranda would drastically undermine the independence of the United States Attorney.

** The only case in which an evidentiary hearing was conducted prior to indictment, *Robert Hawthorne Inc.* v. *Director of Internal Revenue*, 406 F. Supp. 1098 (E.D. Pa. 1976) has been explicitly rejected, *In Re Grand Jury Subpoena Duces Tecum*, 76 Cr. Misc. 1 by the Honorable Edmund L. Palmieri, United States District Judge. The oral opinion was delivered October 1, 1976. Counsel for appellants was present in the courtroom as *amicus curiae* at the time as the matter involved the identical investigation as the present one.

In this case, the district court properly found on the basis of the affidavits before it that the government acted properly in initiating the grand jury investigation into possible obstruction of justice by Doe and that that alone was sufficient reason to deny the motion of Roe and X Corporation that the grand jury investigation into their activities be enjoined.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS E. ENGEL,
RHEA KEMBLE NEUGARTEN,
JERRY L. SIEGEL,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1976— 714—017—724

Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

THOMAS E. ENGEL, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 21st day of October, 1976, he served a copy of the within by placing the same in a properly postpaid franked envelope addressed:

Gerald Walpin, Esq.
575 Madison Avenue
New York, New York

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Thomas E. Engel

THOMAS E. ENGEL

Sworn to before me this
21st day of October, 1976

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978